IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.627/2001

Reserved on.6.8.2007

Decided on. 24.8.2007

Lal Singh. **…Petitioner.**

Versus

Union of India and others. **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*. yes.*

For the petitioner : Mr. P.P. Chauhan, Advocate.

For the respondents Mr. Sandeep Sharma, Assistant Solicitor General of India.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner was selected as Constable (GD) by the Indo-Tibetan Border Police Department at Camp Bavelli in Kullu District in the months of March/April, 1999. He was found medically and physically fit at the time of his recruitment. He was issued appointment letter on 2.4.1999 sequel to which he was directed to join his duties at ITBP, Battalion Training Centre at Bhanu in Panchkula. He joined the training centre on 9.4.1999. He was subjected to strenuous stress during the training. The training stretched from 16.8.1999 to 2.5.2000. The attestation parade was held on 13.5.2000 on which date he was given the rank of Constable. After the attestation, he was again medically examined on 27.5.2000 before being sent to 3rd Battalion, Bukhara Camp in Bareilly where he joined his duties on 30.5.2000. He joined his new place of posting after availing the casual

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? yes.

leave on 12.6.2000. He was directed on 14.6.2000 to move to Ladhakh. He was terminated vide communication dated 31.7.2000 under rule 14 of the Indo -Tibetan Border Police Force Rules, 1994. He preferred an appeal against the order dated 31.7.2000 under rule 28 of the Rules. He approached this Court by way of CWP No. 78/2001 which was disposed of on 27.2.2001 with a direction to the appellate authority to dispose of the appeal in accordance with law. The appeal preferred by the petitioner was rejected on 15.3.2001. The petitioner had been issued clearance certificate by the Adjutant, 3rd Battalion ITBP whereby against his name' case of "hepatitis B" has been mentioned.

Mr. P.P. Chauhan, Advocate had strenuously argued that the case of the petitioner was required to be considered under rule 26 of the Indo-Tibetan Border Police Force Rules, 1994 and not under Rule 14. He had further contended that the petitioner had contracted 'hepatitis B' during the course of his employment with the Indo-Tibetan Border Police since at the time of his enrollment, he was found medically fit. He further contended that the petitioner will be deemed to have been invalided out of service on medical ground and thus entitled to disability pension as per the CCS (Extraordinary Pension) Rules.

Mr. Sandeep Sharma, Assistant Solicitor General of India had supported the order of removal dated 31.7.2000.

I have heard the learned counsel for the parties and perused the record.

It will be apt to take into consideration certain provisions of the Indo-Tibetan Border Police Force Act, 1992 and the Rules framed there-under in conjunction with CCS (Extraordinary Pension) Rules. The Parliament has enacted an Act to provide for the constitution and regulation of Armed Forces by the Union for ensuring the security of the

borders of India and for matters connected therewith called 'the Indo-Tibetan Border Police Force, Act, 1992 (hereafter called the Act for brevity sake). Sub-section (j) of Section 2 of the Act defines the "enrolled person" to mean an under officer or other person enrolled under this Act. Chapter-II of the Act provides for the constitution of the Force and conditions of service of the members of the Force. Section 4 of the Act provides that there shall be an armed force of the Union called the Indo-Tibetan Border Police Force for ensuring the security of the borders of India and performing such other duties as may be entrusted to it by the Central Government. Section 6 of the Act provides that the persons to be enrolled to the Force, the mode of enrolment and the procedure for enrollment shall be as such as may be prescribed. Section 9 of the Act provides that every person subject to this Act shall hold office during the pleasure of the President. Section 11 of the Act enumerates dismissal, removal or reduction by the Director General and by other officers. It is mentioned in section 153 that enrolled persons other than under officers will be constables. Section 156 of the Act empowers the Central Government to frame the Rules.

The Central Government has framed the Rules called 'Indo-Tibetan Border Police Force Rules, 1994 (hereinafter referred to as the Rules for brevity sake). Chapter-III deals with recruitment. Rule 13 prescribes that appointment to the posts of Subedar –Majors or Subedars may be made by the Inspector General of Sub Inspectors by the Deputy Inspector General or Additional Deputy Inspector General, and of enrolled persons by the Commandant or any other officer of the Force who may be appointed as enrolling officer by the Director General in the prescribed manner. Rule 14 deals with probation. Rule 15 lays down the procedure for enrolment, mode of enrolment and other matters connected therewith.

Chapter IV of the Rules provides for termination of service. Rule 26 deals with retirement/discharge of subordinate officers and enrolled persons on grounds of physical unfitness. The same being relevant in the present case reads thus:

> **"26. Retirement/discharge of subordinate officers and enrolled persons on grounds of physical unfitness.-(1) Where a Commanding Officer not below the rank of Commandant is satisfied that a subordinate officer or an enrolled person is unable to perform his duties by reason of any physical disability, he may direct that the said subordinate officer or enrolled persons, as the case may be, be brought before a Medical Board.**
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> **(2) The Medical Board shall consist of such officers and shall be constituted in such manner as may, from time to time, be laid down by the Director General.**
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> **(3) Where the said subordinate officer or the enrolled person is found by the Medical Board to be unfit for further service in the Force, as the case may be, the authority as specified in rule 17, if he agrees with the findings of the Medical Board, communicate to the said person the findings of the Medical Board and thereupon, within a period of 30 days of such communication, the person may make a representation against it to the competent authority supported by a prima facie evidence of error of judgment in the opinion expressed by the Medical Board. Such an evidence should be from a government doctor not below the status of civil surgeon and should contain specific mention that he has taken into consideration the findings of the Medical Board before giving his opinion.**
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> **(4)Whether the persons declared to be unfit for further service makes a representation under sub-rule (3) the same shall be forwarded to the next superior officer, who shall have the case referred to be reviewed by a fresh Medical Board, which shall be constituted in such manner as may from time to time, be laid down by the Director General.**

The superior officer may, having regard to the findings of the fresh Medical Board, pass such order as he may deem fit.

(5) Where no representation is made against the decision of the Medical Board under sub-rule (3), the authority as specified in rule 17, as the case may be, may (if he agrees with the findings of the Medical Board) order the retirement/discharge of person declared to be unfit for further service in the Force.

Appendix 1 (Rule 15) prescribes form (ITB Police Force Recruitment Form. Form of enrollment is provided under Part-I. The conditions of service are enumerated in Part-II. Part-III deals with health certificate which is reproduced in its entirety as under:

"I do hereby certify that I have examined……..candidate for employment in the ITB Police Force. He fulfils medical standards laid down for the I.T.B. Police Force and I cannot discover that he has any disease, constitutional affliction or bodily infirmity. His age according to his own statement is ……..years and by appearance…….years.

Height……Cms.

Chest (a) Maximum……CMs

(b) Minimum……CMs

Place…… Signature of Medical Officer

Date…….

Designation

The Central Government has framed the Rules called the "Central Civil Services (Extraordinary Pension) Rules. Rule 3 dealing with the disablement is reproduced as under:

"3-A. (1) (a) Disablement shall be accepted as due to Government service, provided that it is certified that it is due to wound, injury or disease which-

(i) is attributable to Government service, or

(ii) existed before or arose during Government service and has been and remains aggravated thereby.

(b) Death shall be accepted as due to Government service provided it is certified that it was due to or hastened by-

(i) a wound, injury or disease which was attributable to Government service, or

(ii) the aggravation by Government service of a wound, injury or disease which existed before or arose during Government service.

(2) There shall be a casual connection between-

(a) disablement and Government service; and

(b) death and Government service,

For attrubutablity or aggravation to be conceded, Guidelines in this regard are given in the Appendix which shall be treated as part and parcel of these Rules.

Clarification.-It will be seen from the new (revised) Forms 'C', 'D' and 'E' that these forms of medical certificates have been so designed that they would indicate whether the entitlement criteria laid down in new Rule 3-A have been satisfied or not, and therefore, normally, no other separate certificates in that behalf may be necessary. It is essential for the Administrative Officer as well as the Audit Office (PAO) concerned to satisfy themselves that the death/disability is, in fact, attributable to or aggravated by the Government service which alone makes an EOP Award admissible and for that purpose, it is essential for both of these authorities to satisfy themselves in that behalf and certify the nexus and casual connection between disablement and Government service or between death and Government service (as the case may be), in any particular case, as laid down in the new Rule 3-A on the basis of the medical and other documents regarding the case. If a Government servant had died in such circumstances and that a medical report could not be secured, even then, the nexus and the casual connection between death and Government service has to be established before conceding acceptance of death due to Government service.

[G.I., M.H.A. (Dept. of Per. & A.R.), O.M. No.F.23 (9)-E.V (A)/79, dated the 28 November, 1980]

(3) Notwithstanding anything contained in these rules, the degree of default or contributory negligence on the part of a Government servant may be taken into consideration in making an award under these rules in favour of such Government servant, but, shall not be taken into account where such award is made in favour of the family of such government servant.

The Central Government has issued guidelines for conceding the attributability of disablement or death to Government service in reference to Rule 3-A (2). Item No.5 of the same is reproduced as under:

5. In respect of diseases, the following rules will be observed:-

(a) Cases, in which it is established that conditions of Government service did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for Government service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(C) If a disease is accepted as having arisen in service, it must also be established that the conditions of Government service determined or contributed to the onset of the disease and that the conditions were due to the circumstances on duty in Government service.

(d) In considering whether a particular disease is due to Government service, it is necessary to relate the established facts, in the aetiology of the disease and of its normal development, to the effect that conditions of service, e.g., exposure, stress, climate, etc., may have had on its

manifestation. Regard must also be had to the time factor (Also see Schedule 1-A).”

Schedule-1-A framed under Rule 3 (4) gives the list and classification of disease which can be contracted by service. Infective hepatitis (jaundice) finds mention at Sr. ‘C’.

The petitioner was enrolled in the Force as per the provisions of the Act and Rules framed thereunder. He was medically examined at the time of his selection and thereafter also during the training. No material has been placed on record as per item No.5 of the guidelines framed under the CCS (Extraordinary Pension) Rules by the respondents. If the petitioner had already contracted the disease i.e. hepatitis ‘B’ at the time of his recruitment, it should have been found mention in the medical report at the time of his initial medical examination. It is evident from the language employed in proforma prescribed in Part III of Appendix-1 (Rule15) as reproduced hereinabove that the Medical Officer at the stage of recruitment has to certify that he could not discover that a candidate had any disease, constitutional affliction or bodily infirmity. Accordingly it can safely be presumed that the petitioner was not suffering from the disease ‘hepatitis B’ at the time of his initial medical examination i.e. enrolment and the same will now be deemed to have risen in service.

The case of the petitioner is also covered as per item (B) of Clause (5) of the guidelines for conceding the attributability of disablement or death to Government service as reproduced hereinabove. Since no note has been prepared at the time of initial examination of the petitioner that he was suffering from any disease at the time of his engagement into Government service and the disease contracted by the petitioner will be deemed to have arisen in service. Similar provision existing in Appendix-II of the Pension Regulation for the Army, 1961 (Part-I) has been interpreted

by a Division Bench of this Court in ***Birbal Vs. Union of India***, CWP No. 711 of 2004 decided on 28th December, 2005. Their Lordships have held as under:

> **"The question whether disability is attributable to or aggravated by military service has to be decided in accordance with Rule 7(b) of Appendix II. In Appendix II it has been inter alia provided that "a disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated that the disease could not have been detected on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service."**
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> **It is not in dispute that the petitioner was found physically fit at the time of his enrollment on 3.4.1979. On 7.2.1987, when the petitioner was invalided from service, he was suffering from Generalized Tonic Clonic Seizure. It is not the case of the respondent that medical board had found that the disease existed at the time of entering into service by the petitioner or that it was such as it could not have been detected on medical examination. The record shows that onset of illness was in July 1985 with two episodes of generalized seizures. Lt. Col. M.K. Mahapatha, AMC, Classified Specialist (Medicine) of Medical Hospital, Gwalior, in his summary and opinion dated 11th December, 1986 recorded that the case of the petitioner is of FITS NYD IN MEDICAL CATEGORY 'CEE' w.e.f. September 1985. Further according to him, onset of illness was in July 1985 with two episodes of generalized seizures. Petitioner's case was revised twice at neurological center CH (CC) and Army Hospital Delhi Cantt. EEE had revealed borderline abnormality and he was put on anticonvulsant therapy since April, 1986. Petitioner had two bouts of generalized seizures inspite of taking anticonvulsant drugs. The disease of the petitioner was diagnosed for the first time as generalized seizures only on 11.12.1986. By that time, petitioner had already served for more than 7 years. The**

medical board too has not recorded any finding that neurological disorder from which the petitioner suffered could not have occurred on account of stress and strain of military service. In such circumstances, it has to be presumed that the disease the petitioner suffered from and which had led to his discharge, had arisen during his service and as such, the same was attributable to military service. It is also an admitted fact that disability has been assessed at 20%. We, therefore, do not find any merit in the submission made on behalf of the respondent that the disease from which the petitioner suffered, on account of which he was invalided from service, was constitutional in nature."

There is no specific reason assigned for terminating the petitioner vide order dated 31.7.2000, but it can be culled out from the reply filed by the respondents as well as the clearance certificate issued to the petitioner that the reason for his removal is due to contagious disease i.e. hepatitis B. Hepatitis B is infectious disease and it also finds mention as one of the diseases in Schedule 1-A. Hepatitis B easily spreads by direct contact with the blood or body fluids of an infected person. Since the petitioner had been found suffering from hepatitis B, his case was to be considered under Rule 26 by bringing him before the Medical Board and thereafter the necessary orders were to be issued under Rule 17. The petitioner could only be thereafter discharged from the service being medically unfit and not in the manner in which the petitioner has been removed. The petitioner's disability was to be assessed as per clause (7) of the guidelines for conceding attributability of disablement or death to Government service framed under Rule 3-A which reads as under:

(a) The assessment of a disability is the estimate of the degree of disablement it causes, which can properly be ascribed to service as defined below.

(b) The disablement properly referable to service will be assessed as under-

(i) At the time of discharge from the Government Service.-

Normally the whole of the disablement then caused by the disability. This rule will apply irrespective of whether the disability is actually attributable to service, or is merely aggravated thereby. In the latter event, part of the disablement on discharge may have been present before service and/or may have been brought about by the natural progress of the disability during service. But as it is impossible, for so long as the strain and stress of service continues, to apportion quantitatively the effects of service and non-service factors, the entire disablement at the time of discharge will be taken into account. For example:

(1) Where a person who had a partially disabled hand, sustains an injury to the same hand which renders it less useful than before, or a person with an impaired foot injures the other as a result of service, thus increasing his defect in locomotion; or

(2) Where a person gives history of cough and cold prior to enrolment and is invalided out of service for chronic Bronchitis held to be aggravated by service, pension will be admissible for the total disablement.

(ii) On resurvey of disability after discharge from the service.-

The whole of the disablement then caused by the disability, less the following:-

(1) The part due to non-service factors, such as individual habits, occupation in civil life, accident after discharge, climatic environment after discharge;

(2) Any worsening due to the natural progress of the disability since discharge apart from the effects of service.

Deduction (1) will be made in all cases; while deduction (2) above will apply only in cases where the disability is accepted as aggravated by, but not attributable to service.

(c) In cases accepted as aggravated by service, although a percentage of disablement, equal to more than 20 per cent, may be assessed on medical resurvey, after discharge from service, in accordance with Para. (b) (ii) (2) above, disability pension will cease to be payable as soon as the effects of the aggravation by service have passed away, e.g., where a person with disease, e.g., Fibrositis, Bronchitis, Eczema, etc., held to be aggravated by service, is invalided out and on resurvey was found by the Medical Board to have been restored (a) to his pre-service condition or (b) the condition in which he may have been normally at that time even if he had not joined Government service, aggravation by service will be deemed to have passed away.

(d) Paired organs,-

(i) Paired organs, namely, eyes, ears, arms and legs shall be considered together, where disablement due to service occurs in one of a pair of organs, assessment on discharge will be made with reference to the diminution of the functional capacity of the organs working together. Therefore, assessment will include functional defect of the pair of organs.

(ii) Subject to the exceptions specified below, any subsequent increase in the non-service disablement and non-service arising after discharge whether due to injury or disease will be excluded from the assessment.

(iii) Cases arise in which at the time of discharge, there is damage by service to one only of the paired organs (namely, eyes, ears, arms including hands) and legs (including feet) and the other is, either normal or impaired in a minor degree. Where the disablement acceptable under Clause (ii) above and the disablement of the other limb or organ are together assessable at any subsequent date at 100%, the assessment for pension purposes will be increased by one half of the difference between the current

assessment and 100 per cent. For instance, a pensioner receiving an award at the 40% rate for the loss of an eye who later loses the sight of his other eye through a non-service cause, will have his award increased to 70% rate; and a pensioner with an award at 80% for a gunshot wound of an arm, who later develops severe arthritis of his other arm, thereby being 100% disabled, will qualify for a revised award at 90% rate. Where the combined disablement of the pair of organs is less than 100%, but is more than twice as serious as the disablement acceptable under Clause (ii) above, the assessment will be increased to one half of the combined disablement. If, for example, a pensioner with an award at 30% rate for the loss of vision of one eye partially loses the sight of the other eye through a non-service cause, and the defective vision of both eyes together is assessable at 80%, his award will be increased to the 40% rate.

(iv) The provisions of the preceding sub-clause are applicable even where the second of a pair of organs has been disabled by some generalized disability (e.g., rheumated arthritis) which would have also disabled the first of the pair if it had not been lost or damaged as the result of service.

(e) Composite assessments.-

Where there are two or more disabilities due to service, compensation will be based on the composite assessment of the degree of disablement. Generally speaking, when separate disabilities have entirely different functional effects, the composite assessment will be the arithmetical sum of their separate assessments. But where the functional effects of the disabilities overlap, the composite assessment will be reduced in proportion to the degree of overlapping.

(f) Nil disablement.-

Where, although a definite disability is or has been in evidence, the Medical Board consider that any

disablement resulting therefore has ceased or has become so small as not to admit of assessable compensation, the assessment will be expressed as "nil disablement".

(g) Where the disability due to service has no connection with pre-existing disability, as for example, a person who had lost a finger prior to enlistment, loses a great toe by service, compensation will be restricted to the loss of the great toe only."

The petitioner was hale and healthy at the time of his enrollment and the disease i.e. hepatitis B has been contracted by the petitioner during his service and can be attributed to his employment with the Force. The Circular Annexures RB and RD placed on record by the respondents talk about STD, HIV and hepatitis B tests before training or during training. In the present case the petitioner had already completed the training and was posted after the completion of training with effect from 16.8.1999 to 13.5.2000. He was enrolled as per the provisions of the Act.

The picture which emerges from the conjoint reading of the pleadings of the parties and the Indo-Tibetan Border Police Force Act, 1992 and Indo-Tibetan Border Police Force Rules, 1994 framed thereunder is that the petitioner was enrolled in the Force after due medical examination. If he had contracted any disease after his enrollment, the same is attributable to his service. The gist of the reply filed by the respondents is that the petitioner been terminated from service to avoid spreading of infectious disease hepatitis 'B'. One thing is clear that the petitioner has been terminated for contracting hepatitis B, if that is so, in that eventuality the respondents were required to proceed under Rule 26 and not under Rule 14 of the Indo-Tibetan Border Police Force Rules, 1994. Rules 14 and 26 operate in different fields. Rule 14 prescribes the period of probation, its extension and termination of

enrolled personnel and Rule 26 on the other hand speaks about discharge on medical grounds after being examined by the Medical Board.

The order dated 31.7.2000 on the face of it is innocuous but from its perusal it becomes evident that the foundation for terminating the petitioner was that he had contracted hepatitis B. In view of this matter, the petitioner was to be discharged on the ground of being physically unfit and his case is necessarily to be taken out from the ambit of rule 14. Rule 14 will apply if the enrolled personnel is not found suitable to discharge his duties and rule 26 will apply if the enrolled person is found physically unfit. The respondents to avoid rule 26 have taken recourse to rule 14 illegally. The expressions 'foundation and motive' has been analyzed by the Hon'ble Supreme Court in detail in ***Chandra Prakash Shahi Versus State of U.P. and others,*** (2000) 5 SCC 152 as under:

> **"The important principles which are deducible on the concept of "motive and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of the employee of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".**

Even a person on probation is entitled to certain rights as has been held by the Supreme Court in ***V.P. Ahuja Versus State of Punjab and others***, (2003) 3 SCC 239 as under:

> **"Learned counsel for the respondents has contended that the appellant, after appointment, was placed on probation and though the period of probation was two years, his services could be terminated at any time during the period of probation without any notice, as set out in the appointment letter. It is contended that the appellant cannot claim any right on the post on which he was appointed and being on probation, his work and conduct was all along under scrutiny and since his work was not satisfactory, his services were terminated in terms of the conditions set out in the appointment order. This plea cannot be accepted.**
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> **A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of nature justice."**

True it is that the vires of rule 14 of the Act has not been assailed, but prima facie it appears violative of section 23 of the Contract Act. The respondents are bound to assign the reasons even if a person is removed during the period of probation. The expression used in rule 14 "without assigning any reasons" on the face of it is unconstitutional, unfair, unreasonable and void. I need not elaborate further on this issue since the case of the petitioner was to be considered under rule 26 and not under rule 14.

The upshot of the above discussion is that:

(i) **the issuance of Annexure P-1 dated 31.7.2000 is violative of Article 14 of the Constitution of India and is liable to be struck down;**

(ii) **the petitioner was required to be brought before the Medical Board as per Rule 26 and thereafter he could be discharged after assessing his disability;**

(iii) **the petitioner was hale and hearty at the time of his enrollment since nothing has been prepared as per item No.5 of the guidelines framed under the CCS (Extraordinary Pension) Rules;**

(iv) **after discharge, as per Rule 26, his disability was to be assessed and thereafter disability pension was to be paid to him.**

Accordingly this writ petition is allowed. Annexure P-1 dated 31.7.2000 is quashed and set aside. The respondents are directed to convene the Medical Board as per Rule 26 of the Indo-Tibetan Border Police Force Rules, 1994 and thereafter the disability of the petitioner be assessed and on that basis he be paid the disability pension strictly as per CCS (Extraordinary Pension) Rules. The entire exercise be undertaken by the respondents within a period of 3 months from today. There shall be no order as to costs.

(Rajiv Sharma), Judge

August 24, 2007
Awasthi